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Office of Campaign and Political Finance

One Ashburton Place, Room 411

Boston, MA 02108

Advisory Opinion

January 23, 2002

AO-02-03

Phyllis M. Boucher, Supt./Director
Town of Norwood, Board of Health
566 Washington Street, P.O. Box 40
Norwood, MA 02062

Re: Appearing on local cable program

Dear Ms. Boucher:

This letter is in response to your January 3, 2002 request for guidance.

You have stated that at the request of the Norwood Board of Health, the Board of Selectmen have placed a non-binding question on the ballot for the April town election. The question is worded as follows:

“Do you support a regulation to ban smoking in all food service facilities in the Town of Norwood?”

As an appointed agent of the Board of Health you made contact with the host of a local cable program, “Inside Norwood,” requesting an opportunity to discuss issues concerning environmental tobacco smoke and why the Board of Health considers this an important public health issue. You have appeared on local cable television about ten or twelve times in the past to discuss health issues. On several of these occasions the topics discussed related to the health consequences of smoking. The program is taped at 3:00 p.m., which is during your regular workday. While the issues to be discussed are within the scope of the Board of Health’s responsibilities to promote and protect public health, you believe you may be asked during the program if residents should vote yes or no on the ballot question.

Your office has received inquiries from newspapers regarding your position on the ballot question and you expect to receive additional inquiries from the public. The ballot question was the immediate cause of your interest in discussing the health issues relating to environmental smoke on the show.

QUESTION

Would your participation in the show comply with the campaign finance law?

ANSWER

Yes, because it would be consistent with your official responsibilities.

DISCUSSION

In Anderson v. City of Boston, 376 Mass. 178 (1978), appeal dismissed, 439 U.S. 1069 (1979), the Supreme Judicial Court held that the City of Boston did not comply with the campaign finance law when it appropriated \$975,000 to staff an office for the purpose of disseminating information urging the adoption of a ballot question and requested City employees to spend time during their workday in support of the effort. The court held that a municipality may not use public funds “to speak militantly about a referendum issue of admitted public importance where the Legislature of the State [by enacting the campaign finance law which contains no provisions allowing municipal expenditures for such purposes] has said it may not.” Id., at 192.

The court recognized a distinction between appropriating funds and requiring staff to support a public information campaign to influence a ballot question, on the one hand, and speech regarding a ballot question on the other. The court stated that although municipal employees could not be required to devote time during the workday to a public information effort, “individual city employees may have certain rights of speech, even during working hours, concerning [a ballot question.]” 376 Mass. at 199-200.

Anderson prohibits the use of public resources by public officials to distribute information to voters regarding a ballot question if not authorized to do so by statute. See IB-91-01. It also prohibits use of such resources to *campaign* for a position on a ballot question. Anderson does not, however, prohibit policy-making officials from acting or speaking regarding ballot questions if in doing so they are acting within the scope of their official responsibilities. See IB-92-02 (a copy is enclosed). As noted in IB-92-02, “if appointed officials were prohibited from stating their positions regarding a ballot question related to their official responsibility, such a prohibition would unnecessarily (and probably unconstitutionally) restrain such officials from carrying out the duties of their offices.”

In IB-92-02, the office listed several examples of permissible speech. One of the examples states that an appointed policy-making official may “respond to questions from the press or the public about the official’s position on a ballot question that is within the official’s responsibilities.” The office has not defined the extent, however, to which an appointed public official may, *on the official’s initiative*, participate in a non-campaign event during the official’s workday in which he or she will likely be asked to discuss the merits of a ballot question.

The court’s recognition in Anderson of a right to speak regarding a ballot question during work hours suggests that the campaign finance law should be construed to permit speech regarding the merits of a ballot question during work hours on the official’s initiative, if the subject of the ballot question is within the scope of the official’s area of responsibility.

Such official may not however, undertake actions that are inconsistent with his or her official responsibilities. For example, the official should not speak regarding the merits of the ballot question at

a campaign event during work hours, make expenditures of public funds to campaign for the ballot question, e.g., by placing an advertisement in a newspaper urging a “yes” or “no” vote on the ballot question, or distribute printed information to voters regarding the ballot question, unless authorized to do so by the Legislature.

For the reasons stated above, this office believes that your participation in the “Inside Norwood” show would not violate the campaign finance law. Appearing on the show would allow you to respond to questions and concerns of the public, already expressed to your office, regarding the issue of environmental tobacco smoke. This is an issue that is within the scope of your official responsibilities. Your speaking regarding the issue would be consistent with your responsibilities, because such speech would concern a matter within the scope of your responsibilities, would not be made in connection with a campaign event, would not involve the expenditure of public funds to campaign in favor of or against the ballot question, and would not involve the distribution of written information to voters regarding the ballot question.

Thank you for your interest in the campaign finance law. This opinion is limited in scope to providing guidance under that statute and is based on your letter and conversations with OCPF staff. Please do not hesitate to contact us if you have any questions regarding this or any other campaign finance matter.

Sincerely,

A handwritten signature in cursive script, reading "Michael J. Sullivan", followed by a vertical line.

Michael J. Sullivan
Director

MJS:gb

Enclosure

cc: Michael C. Lehane, Town Counsel